United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

77-1015

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1015

UNITED STATES OF AMERICA,

APPELLEE,

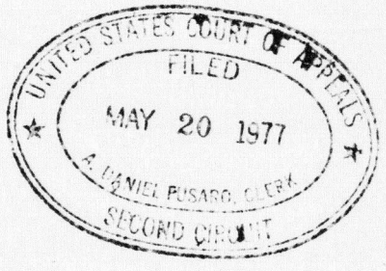
-vs-

JAMES APUZZO,

APPELLANT.

On Appeal from The United States District Court
For The District of Connecticut

PETITION FOR REHEARING



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The appellant, James Apuzzo, petitions for rehearing of his appeal, with respect to the government's use of a misdemeanor conviction to impeach his credibility. The panel decided this issue against him on a ground not argued by the parties: that evidence of the conviction was admissible in any event to show predisposition to commit the offense, by way of rebuttal to his defense of entrapment. Slip op. 3347, 3349. The conviction cannot be sustained on this basis, however, and the Court should rehear the matter and rule on the issue as presented in the parties' briefs.

It is true that some prior convictions fall within the area of evidence admissible to show predisposition. Sorells v. United States, 287 U.S. 435, 451 (1932). See 2 Weinstein's Evidence ¶404[04], at 404-25 to-26 (1976). In United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971), for example, this Court upheld the admission of evidence of an attempt to bribe an IRS agent to rebut the defense of entrapment to an identical charge. When such evidence is introduced, however, this Court has consistently required a careful limiting instruction. United States v. Valdes, 417 F.2d 335, 339 (2d Cir. 1969), cert. denied, 399 U.S. 912 (1970); United States v. Morrison, 348 F.2d 1003, 1005 (2d Cir. 1965). Because the government never offered the evidence for the purpose relied on by this Court, nor was it tendered by the trial judge to the jury on that basis, no such instruction was given. Cf. Fed. R. Evid. 105. Rather,

the evidence was offered, objected to, and admitted solely for the very different purpose of impeaching the appellant's credibility as a witness in his own behalf. Compare Fed. R. Evid. 404 with Fed. R. Evid. 609. Without the appropriate instruction, the evidence was not admissible to prove predisposition, and the judgment cannot be affirmed on that basis.

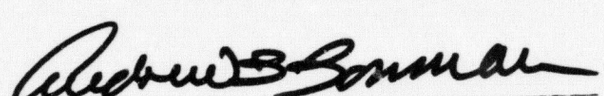
Moreover, evidence admitted to show predisposition may not be considered to impeach the credibility of the testifying defendant unless independently admissible for that purpose under Rule 609. This misdemeanor conviction was not. This Court's additional comment that, "In any event, . . . a crime which involves defrauding the revenues stands high in the category of crimes affecting veracity" (citations omitted), slip op. at 3349, falls short of the mark. As expressly noted in United States v. Hayes, ____ F.2d ____ (2d Cir., April 21, 1977), slip op. 3123, 3129, Rule 609 only authorizes the admission of such convictions if they are felonies. Rule 609(a)(1). Misdemeanors, such as appellant's prior conviction, must be excluded unless they involve "dishonesty or false statement" under the very narrow definition given in the House-Senate Conference Report (discussed in appellant's principal and reply briefs). Rule 609(a)(2). Yet the trial judge expressly instructed this jury that they could consider the appellant's misdemeanor conviction in weighing his credibility. Even if the conviction was admissible for some other purpose, the instruction given was prejudicial error. Erroneous admission, such as occurred

here, requires reversal unless "harmless beyond a reasonable doubt," because it involves violation of a "specific command of Congress." (See Appellant's Reply, point 2.)

CONCLUSION

The judgment below cannot be affirmed on the ground that the challenged evidence would have been admissible in any event, albeit for a different purpose. Under this Court's precedents such admission would have required a special limiting instruction not given here and would have rendered erroneous the limiting instruction that was actually given. Moreover, contrary to the suggestion of this Court's decision, the impeachment evidence was not admissible for the purpose relied on by the trial judge. The Court should rehear the case, withdraw its decision of May 5, 1977, and reverse the conviction.

Respectfully submitted,



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Dated: May 18, 1977

On the Petition:

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition For Rehearing have been mailed to Hugh Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 18th day of May, 1977.

Robert B. Berman